

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, and Joseph T. Kelliher.

Natural Gas Pipeline Company of America

Docket No. RP03-262-004

ORDER DENYING REHEARING AND GRANTING CLARIFICATION

(Issued August 9, 2004)

1. This order addresses the Indicated Shippers<sup>1</sup> request for rehearing and clarification of the Commission's March 29, 2004 Order (the March 2004 Order)<sup>2</sup>, which required Natural Gas Pipeline Company of America (Natural) to revise its tariff in certain respects. For the reasons set forth, the Commission denies rehearing, but grants clarification as to one matter, and directs Natural to file a revised tariff sheet as more fully discussed below.

**The March 2004 Order**

2. The March 2004 Order addressed, among other things, the Indicated Shippers protest of Natural's filing to comply with the Commission's March 27, 2003 Order<sup>3</sup> in this proceeding concerning how Natural would grant firm shippers reservation charge credits when Natural did not deliver the required service. The March 2004 Order required Natural in the non-*force majeure* situation, which is an event under the pipeline's control, to grant full reservation charge credits for all scheduled gas quantities not delivered. The order stated that consistent with Commission precedent, interruptions of service due to unscheduled maintenance is considered a *force majeure* event, and the appropriate credit in that situation is determined under the rules for that type of event.

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<sup>1</sup> The Indicated Shippers are Chevron, U.S.A. Inc., BP Energy Co., and BP America Production Co.

<sup>2</sup> 106 FERC ¶ 61,310 (2004).

<sup>3</sup> 102 FERC ¶ 61,326 (2003).

3. The Commission addressed the *force majeure* situation stating that Commission policy requires that the pipeline and its shippers must share the risk because neither party is responsible. The March 2004 Order accepted Natural's proposal that the applicable reservation charge credit would not apply to a shortfall that:

... occurs either (a) within ten (10) Days following a force majeure event as contemplated by Section 27 of the General Terms and conditions, or (b) prior to the date Natural has or should have, in the exercise of due diligence, overcome the force majeure event, whichever occurs first.

The order noted that when the shipper becomes entitled to the reservation charge credit once the ten-day period ends, Natural must grant the shipper full reservation charge credits.

#### **Indicated Shippers' Request for Clarification and Rehearing**

4. The Indicated Shippers argue that the Commission erred in stating that it would treat unscheduled maintenance as a *force majeure* event. They contend that this will deny shippers any credit, and the Commission should require Natural to grant full reservation charge credit for unscheduled maintenance. Second they contend that the Commission erred in accepting Natural's proposal as to how Natural would credit shippers in a *force majeure* situation. They assert that under Natural's proposal there will not be any credit for an initial period, and the Commission should require Natural to grant a partial credit from the outset in the form approved by the Commission for other pipelines.

5. Finally Indicated shippers request that the Commission clarify that when a shipper's service is disrupted at its primary point it only loses the reservation charge credit if that shipper actually nominates and actually receives service at a secondary point. The Indicated Shippers state that in its April 17, 2003 compliance filing, in section 5.2(c)(1), Natural proposed that the shipper would not receive a credit "if the Shipper has the ability to reschedule deliveries at alternate points using its rights under the firm contract(s) affected." The Indicated Shippers state that the March 2004 Order did not address this issue. The Indicated Shippers request that the Commission clarify that this credit exemption applies only if the shipper actually uses secondary point service.

## Discussion

6. We find no merit in the request for rehearing, but will grant clarification concerning the issue of credits when the shipper could use a secondary point. In the March 2004 Order, the Commission explained that where scheduled gas is not delivered in a non *force majeure* event the pipeline must provide full credit to the affected shipper because the failure was due to the pipeline's conduct, and was within its control. This is not true in the *force majeure* situation, which by definition is where the event is not within the control of the pipeline. The March 2004 Order then cited to Commission precedent, including *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262 (2003), (*El Paso*) where the Commission stated that unscheduled maintenance is an event not within the control of the pipeline, and should be treated as a *force majeure* event. The Indicated Shippers seem to argue that unscheduled maintenance must be associated with another *force majeure* event to be eligible for treatment as *force majeure*, and that *El Paso* was wrongly decided, and can not be relied upon as precedent.

7. The Indicated Shippers' argument is fallacious for a number of reasons. *El Paso* was only the most recent precedent, and ever since the Commission clarified its policy concerning the issue of reservation charge credits for instances of service curtailment in Opinion No. 406,<sup>4</sup> the Commission has treated unscheduled maintenance as a *force majeure* event. It is treated as such an event because, like other traditional *force majeure* events, such as acts of God, it is not within the pipeline's control. In fact, in Natural's tariff in § 27.2(a), cited by the Indicated Shippers, the term *force majeure* is defined as "events not within the control of the party claiming suspension." To avoid the obvious result from this definition of *force majeure*, the Indicated Shippers appear to argue that there is no such thing as unscheduled maintenance, and that parties should always consider maintenance as within the control of the pipeline. We cannot accept such an argument. If there is an interruption of service due to maintenance, the Indicated Shippers can question whether it should be treated as scheduled or unscheduled. However, that does not support their argument that maintenance should never be considered a *force majeure* event.

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<sup>4</sup> Tennessee Gas Pipeline Co., 76 FERC ¶61,022 (1996) (Opinion No. 406), *Order on Reh'g*, 80 FERC ¶61,070 (1997) (Opinion No. 406-A) (also cited as *Tennessee*).

8. We also deny the Indicated Shippers' request regarding the amount of reservation charge credit granted shippers in a *force majeure* event. The March 2004 Order stated that Commission policy is that when there is a shortfall due to a *force majeure* event, all parties should bear the risk, and the pipeline must provide a partial credit to the affected firm shippers. The order approved Natural's proposal that where there is a service interruption in the *force majeure* situation, the applicable reservation charge credit would not apply to a shortfall that:

... occurs either (a) within ten (10) Days following a force majeure event as contemplated by Section 27 of the General Terms and conditions, or (b) prior to the date Natural has or should have, in the exercise of due diligence, overcome the force majeure event, whichever occur first.

9. Natural's proposal was similar to the *force majeure* reservation charge credit provision that the Commission accepted in *Texas Eastern*,<sup>5</sup> which the Commission described in Opinion No. 406 as "a form of risk-sharing through the establishment of limits on the length of time in which a pipeline may be excused from providing reservation charge credits."<sup>6</sup>

10. In the request for rehearing, the Indicated Shippers assert that approval of what they characterize as this "ten day moratoria" is not a reasonable way to allocate the risks between the parties. In support of their request, they raise the same argument that they urged previously, namely that the Commission should not approve the ten-day moratoria period because although it is limited by the due diligence caveat, as a practical matter, it will be difficult for shippers to obtain the information needed to apply the due diligence provision. They assert that this "ten day free pass" would provide a disincentive to the pipeline to promptly remedy the situation. They again posit that the Commission should require Natural to grant, from the onset of the service interruption, a partial reservation charge credit consisting of the portion of the transportation rate associated with the pipeline's return on equity and associated income taxes. They note that the Commission previously approved this form of partial credit in Opinion No. 406.

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<sup>5</sup> 62 FERC ¶61,015 (1993).

<sup>6</sup> 76 FERC at 61,089.

11. The March 2004 Order addressed the Indicated Shippers' argument. The order explained that in the Opinion No. 406 case the Administrative Law Judge had adopted a partial credit in the form the Indicated Shippers seek here. In Opinion No. 406 the Commission accepted that approach, but held that that was not the only way of granting the partial credit since there may be different ways to implement the sharing of risk requirement in the *force majeure* situation, including the "ten-day time period" approach adopted in the *Texas Eastern* case. The March 2004 Order did not require Natural to modify its proposal since Natural's proposal for the partial credit was similar to the one adopted in *Texas Eastern* and Opinion No. 406 found this was an appropriate method of sharing the risk. Since the Indicated Shippers have not raised any arguments not previously considered, we will deny rehearing.

12. The Indicated Shippers request that the Commission clarify the last sentence in section 5.2(c)(1) of Natural's tariff. That sentence states that when there is an interruption of service there will be no reservation charge credit "if the Shipper has the ability to reschedule deliveries at alternate points using its rights under the firm contract[s] affected."<sup>7</sup>

13. The Indicated Shippers assert that since invariably there is available capacity at some secondary points on Natural's system, shippers would always have the ability to use a secondary point. Therefore, accepting Natural's proposal would essentially guarantee that shippers would never receive any credits when there was an interruption of service. They request that the Commission clarify that the exemption applies only if the shipper actually uses the secondary point service. We find merit in this request. Shippers pay a reservation charge to guarantee access to capacity at primary receipt and delivery points. We agree that if the primary point service is disrupted, and the shipper does not use secondary point service, the shipper should get a full reservation charge credit. If it chooses to use a secondary point, then obviously it will not receive a credit since it did receive a service, but it should not lose the credit if it decides not to use a secondary

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<sup>7</sup> This provision was included in Natural's April 17, 2003 compliance filing to a prior Commission order in this proceeding, and Natural included it in its April 13, 2004 compliance filing.

point. Accordingly, Natural must revise its tariff to eliminate this provision, since if the shipper uses a secondary point there will be no credit, and if it does not use a secondary point, there will be a credit.<sup>8</sup>

The Commission orders:

(A) The Indicated Shippers' request for rehearing is denied.

(B) The Indicated Shippers' request for clarification is granted.

(C) Natural must file a revised section 5.2(c)(1) of the General Terms and Conditions within 15 days from the date this order issues, eliminating the last sentence in that section.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Linda Mitry,  
Acting Secretary.

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<sup>8</sup> By letter order issued June 8, 2004, the Commission accepted Natural's April 13, 2004 filing as fully complying with the March 29, 2004 Order. This order requires Natural to file a revised section 5.2(c)(1).